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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to	)	WT Docket No. 96-162
Establish Competitive Service Safeguards for	)	
Local Exchange Carrier Provision of	)	
Commercial Mobile Radio Services	)	

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REPLY COMMENTS OF
SBC COMMUNICATIONS INC.

Respectfully Submitted,

SBC Communications, Inc.

Bruce E. Beard
Southwestern Bell Mobile Systems

Dated: October 24, 1996

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SUMMARY

The structural separation rules should be eliminated immediately--not expanded as advocated by various competitors of the BOCs and others who would be affected by such expansion. Expansion of the structural separation rules is unwarranted and would result in the Commission reversing itself, without proper justification, on Orders ranging from the initial Order declining to impose structural separation on all local exchange company affiliate cellular operations to the decision in the NPRM granting other BOCs a waiver of 22.903 restrictions as they relate to out-of-region operations.

As noted in SBC's initial Comments, the basis for imposing structural separation is no longer valid. Commentors advocating the continued application of the rules and the expansion of the rules to include other CMRS services and other Tier 1 LECs mistakenly construe alleged control of the local exchange market with the ability to engage in discriminatory practices. As this Commission recognized in the PCS Order, non-structural interconnection safeguards existing in 1993 were sufficient to protect against discriminatory interconnection practices. Attempts to delay the elimination of the structural separation requirements by tying elimination to various provisions of the Telecommunications Act of 1996 are unjustified. Likewise, claims that the structural separation rules are still required for cellular to prevent against cross subsidization are also unwarranted given price cap regulation and applicable accounting rules.

The Commission should also reject arguments to impose additional obligations on the BOCs and Tier 1 LECs, either in addition to or in place of the structural separation requirements. The CPNI restrictions in 22.903(f) have been superseded by Section 222 of the Act and issues regarding the application of Section 222 should be left to the docket established for that purpose.

The Commission should eliminate the structural separation provisions of 22.903 and should rely on the same non-structural safeguards which have proven effective for other LECs for over a decade. Additional regulatory obligations are unwarranted.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Amendment of Part 22 of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	))))))	WT Docket No. 96-162

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc., on behalf of its subsidiaries Southwestern Bell Telephone Company (SWBT) and Southwestern Bell Mobile Systems, Inc. (SBMS), files this Reply to certain comments filed in response to the Commission's Notice of Proposed Rulemaking[1].

1. There is No Basis for Continuing the Applicability of or Expanding the Scope of the Structural Separation Rules.

The Commission sought comment on whether the structural separation requirements (47 CFR 22.903) for the provision of cellular by Bell operating company (BOC) affiliates should be 1) continued for a transitional period wherein a streamlined version of the rules would be in effect until a set sunset date, or 2) immediately eliminated and replaced by a set of uniform non-structural safeguards.[2] The Commission also proposed that the provision of cellular, PCS and

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[1]In the Matter of the Commission's Rules to Establish Competitive Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT 96-162, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order (Released August 13, 1996). ("NPRM").

[2]NPRM, paras. 80-83.

ESMR by a Tier 1 LEC be subject to a separate affiliate requirement and queried whether 22.903 should be extended to include all Tier 1 LECs.

As discussed by SBC and the other BOCs having cellular interests, Section 22.903 should be eliminated immediately.[3] Not surprisingly, wireless carriers and resellers who are not subject to the structural separation rules or affiliated with a Tier 1 LEC (collectively "non-affected wireless competitors") and who seek to gain an aritificial competitive advantage by imposing costs and inefficiencies on their competitors, support both the continued application and expansion of the structural separation rules.[4] For example, Cox, Comcast and AT&T contend that the Commission should expand the scope of 22.903 to include all in-region BOC CMRS and all Tier 1 LEC CMRS.[5] AT&T goes so far as to campaign for the inclusion of safeguards on BOC out-of-region CMRS.[6]

The non-affected wireless competitors thus seek to overturn the Commission's original 1982 decision not to apply the structural separation requirements to all LEC affiliated cellular operations,[7] the Commission's 1993 decision not to apply the structural separation

[3]See, SBC Comments, pp. 3-10; Ameritech Comments, pp. 3-10; Bell Atlantic and Nynex Comments, pp. 5-13; BellSouth Comments, pp. 9-34.

[4]See, Cox Communications, Inc., p. 1 (Cox); AT&T Wireless Services, Inc., pp. 2, 11-15 (AT&T); Comcast Cellular Communications, Inc., pp. 3-8 (Comcast); CMT Partners, p. 2.

[5]Cox, pp. 2-3; AT&T, pp. 11-15; Comcast pp. 3-8.

[6]AT&T, pp. 12-13.

[7]In the Matter of An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, CC Docket No. 79-318, 89 F.C.C.2d 58, para. 44 (1982). ("Cellular Standards Packet").

requirements to LEC provision of PCS,[8] the Commission's 1995 decision not to apply structural separation to LEC provision of specialized mobile radio services,[9] the Commission's granting of a waiver to SBMS from 22.903 as it related to out-of-region operations[10] and the Commission's similar grant of such authority to other out-of-region BOC cellular operations.[11] If the non-affected wireless competitors wanted to challenge the various orders not at issue in the NPRM, the proper venue would have been by filing a Petition for Reconsideration or Petition for Review of such orders. The non-affected wireless competitors present no new evidence or changed circumstance on which to base a Commission reversal of such decisions--rather, they merely present the same "what-ifs" based on LEC control of land line facilities.

While the non-affected wireless competitors attempt to assign a high burden of proof to the BOCs in regards to the elimination of the structural separation requirements, they expect the Commission to reverse itself on the above mentioned Orders and Waivers based on no new evidence and no new arguments.[12] For example, Cox states that:

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[8]In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, paras. 112-127 (1993). ("PCS Order")

[9]In the Matter of Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHZ Land Mobile Band and Use of Radio Dispatch Communications, GN Docket 94-90, Report and Order, 10 FCC Rcd 6280, at 6293 (1995). ("SMR Order").

[10]In the Matter of Motion of Southwestern Bell Mobile Systems, Inc., FCC 95-436, CWD 95-5, Memorandum Opinion and Order (Released October 25, 1995). ("SBMS Waiver Order").

[11]NPRM, para. 57.

[12]See, Cox, p. 3; Comcast, pp. 7-8; MCI, pp. 12-13.The burden of proof in the instant proceeding regarding the continued applicability of 22.903 has been set down by the United States Circuit Court of Appeals for the Sixth Circuit:

If Personal Communication Service and Cellular are sufficiently similar to warrant the

the burden of proof should rest on those who advocate abandoning the successful structural separation regime. In other words, until the BOCs prove the cost of structural separation outweigh the competitive benefits, the Commission should not abandon structural separation and should expand it to apply to all Tier 1 LEC in-region CMRS.

What possible legal premise can support an argument that the BOCs must "prove the costs of structural separation outweigh the competitive burdens" to change the structural separation requirement, but the same rules may be changed to include Tier 1 LECs merely upon a showing that they control land line facilities? The Tier 1 LECs controlled land line facilities in 1982 when the Commission decided that the structural separation rules should not apply--such status alone cannot now be said to require the applicability of the structural separation requirement. The Tier 1 LECs controlled land line facilities when the Commission refused to extend these structural separation requirements to LEC provision of PCS services. Imposing such structural separation on Tier 1 LECs cannot be based on a perceived need for "regulatory parity" because regulatory parity is not achieved--cellular licensees are still being treated differently than PCS licensees and cellular licensees with LEC affiliations are being treated differently than cellular licensees with competitive LEC affiliations, or cellular licensees with no LEC affiliation. Not surprisingly, the non-affected wireless competitors feel that regulatory parity is important if it means treating Tier 1 LEC CMRS operations or BOC PCS operations the same as BOC cellular is treated today (i.e., structural

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cellular eligibility restrictions and are expected to compete for customers on price, quality and services . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers. . . . Accordingly, we believe the FCC should determine as soon as possible whether the structural separation requirement is necessary and in the public interest". See, Cincinnati Bell Telephone Company v. Federal Communications Commission, 69 F.3d 752, 768 (6th Cir. 1995).

separation),[13] but is not as important if it means treating BOC cellular the same as PCS is treated today.[14]

Nothing has changed which would require the Commission to reverse its decision that PCS is not subject to the structural separation rules. As US West notes, the only two developments of substance that have occurred since the Commission's 1993 PCS Order is that land line and CMRS markets have become increasingly competitive and Congress has enacted the "pro-competitive, deregulatory" Telecommunications Act of 1996 (the "new Act").[15] Neither supports the Commission reversing its previous decision to not expand the utilization of costly, inefficient structural separation.

Attempts by the non-affected wireless competitors to draw support from the new Act for the continued or expanded application of structural separation do not withstand scrutiny. For example, CMT Partners states that "the most straight forward and persuasive arguments in support of the need for a continuing requirement for structural separation lie in recent Congressional mandates, included in the 1996 Act. Structural separation is a condition to BOC entry into certain other competitive communications fields (citing various provisions)".[16] Even more persuasive, however, is the argument that Congress obviously knew how to require separate subsidiaries for various competitive services and required such separate subsidiaries where it deemed appropriate

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[13]See, AT&T, pp. 11-12, 14-15; Comcast, p. 7.

[14]See, AT&T p. 2--"The Commission's concerns about regulatory parity between cellular and other CMRS, as well as between BOCs and other local exchange carriers ("LECs") do not require elimination of the structural separation requirements".

[15]US West, Inc., p. 2.

[16]CMT Partners, p. 5. See also, Comcast, p. 2.

but did not require a separate subsidiary for the provision of CMRS. Furthermore, Congress must be presumed to have the then-current application of structural separation requirements contained in the Commission's Rules at the time it considered passage of the Act. Yet, Congress imposed no structural separation requirements on LEC/CMRS providers.

The non-affected wireless competitors have presented no valid reason or change in circumstance to support a change in the Commission's previous decisions regarding the applicability of the structural separation rules to other services or the granting of waivers from such rules. As the Commission noted by its SMR Order and the PCS Order, circumstances have changed rendering the basis for imposing structural separation no longer valid in the CMRS market. The non-affected wireless competitors' attempts to strap the structural separation requirements on additional services and carriers should be rejected.

2. Alleged Control of the Local Exchange Market Does Not Equate to the Ability to Engage in Discriminatory Interconnection Arrangements.

The non-affected wireless competitors argue that the fundamental rationale underlying the imposition of the structural separation rules has not changed because the BOCs still allegedly control the land line local exchange market and use the same rationale in an attempt to impose the structural safeguards on other Tier 1 LECs.[17] The argument misses the point in that the structural separation rule was not instituted because the BOCs controlled land line facilities--it was instituted to prevent discriminatory interconnection practices.[18] Arguments that elimination of the

[17]AT&T pp. 4-14, MCI, pp. 3-8; Cox, pp. 2-3; Comcast, pp. 17-18.

[18]See, NPRM, para. 37.

structural separation rule must await various actions under the new Act are simply misplaced. The Commission determined in the PCS Order, prior to the new Act, that the various interconnection rules and policies adopted since the promulgation of the structural separation rules are sufficient to protect against discriminatory treatment in integrated LEC-PCS operations.[19] Such rules are likewise sufficient to protect against discriminatory treatment in terms of cellular operations.

The attempts by MCI and AT&T to create claims of discriminatory interconnect treatment fail dismally. MCI's claim that discriminatory treatment and lack of meaningful competition can be shown by the reluctance of "BOC cellular affiliates" to allow MCI to interconnect its reseller switch to the cellular switch is both irrelevant and misleading. The issue of allowing reseller interconnection has been debated before this Commission in CC Docket 94-54. The Commission has tentatively determined that it will not mandate such interconnection.[20] Likewise, the Commission has determined that CMRS providers are not local exchange carriers and thus not subject to the requirements imposed on LECs including offering direct interconnection.[21] Further, MCI fails to note what its experience has been with attempts to obtain reseller switch

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[19]PCS Order, paras. 112-127.

[20]In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket 94-54, Second Notice of Proposed Rulemaking, para. 96-96 (1995).

[21]In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, para. 1004 (1996).

interconnection arrangements with other non-LEC affiliated cellular carriers such as AT&T Wireless, the largest wireless carrier serving a population of over 68,302,000.[22]

Likewise, AT&T's attempt to claim discriminatory treatment based on the allegation that "(A)s the Commission has documented extensively, LECs have failed to provide CMRS providers with mutual compensation and nondiscriminatory interconnection rates" is inherently misleading.[23] The Commission acknowledged in 1995 that it was "unaware of any complaints alleging discriminatory interconnection filed by unaffiliated cellular providers against wireline carriers with cellular affiliates".[24] The debate over mutual compensation did not involve any claim that affiliated cellular carriers were being treated any differently than non-affiliated carriers.

As SBC noted in its initial Comments, non-BOC LECs have existed with cellular affiliates and without structural separation for over a decade. As GTE, the largest of such carriers, confirms, in over 15 years of operation the Commission has received no complaints alleging anti-competitive behavior by one of its telephone operating company's favoring their affiliated cellular operations.[25]

The interconnection rules and policies promulgated since the adoption of the structural separation rules are sufficient to protect against discriminatory treatment in interconnection arrangements.

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[22]See, The Wireless Source Book--The Wireless Market Book, Cellular Telephone Industry Association, p. 55, Spring 1996. (Citing 1990 Census figures).

[23]AT&T, p. 7.

[24]SMR Order, 10 FCC Rcd at 6293.

[25]GTE, p. 4.

3. **Continuation of the Structural Separation Rules Cannot be Justified by Claims of Concern over the Ability to Cross-Subsidize.**

The NPRM appropriately recognized that the "Joint Cost Order," affiliate transaction and Part 64 cost allocation rules, together with the price cap regime for tariffed LEC interstate services, go far in reducing the possibility of undetected cost-shifting among the LEC interstate services."[26] This finding was consistent with the Commission's previous conclusion that BOCs and other LECs need not follow any separation rules in their offerings of PCS. Rather, the FCC found the existing safeguards against cross-subsidy to be sufficient.[27]

While acknowledging the sufficiency of existing nonstructural accounting safeguards, the NPRM sought comment on this issue, especially from "the parties alleging continued cross-subsidy problems under price caps." The NPRM asked such parties "to provide specific data and argumentation in support of their claim."[28] A few of the non-affected wireless competitors make generalized arguments about the inadequacy of price caps to prevent cross-subsidy as part of their pleas to require structural separation for BOCs and other LECs. These same arguments have been raised in the Accounting Safeguards proceeding, CC Docket No. 96-150[29], and are more appropriately resolved there.[30] However, SBC will reiterate its responses to these arguments.

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[26]NPRM, para. 46.

[27]PCS Order, para. 112-127.

[28]NPRM, para. 46.

[29]Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, 11 FCC Rcd 9054 (1996).

[30]SBC and other LECs addressed similar arguments concerning price cap regulation in their filings in CC Docket No. 96-150. SBC hereby incorporates its Comments and Reply Comments from that proceeding. See SBC Comments at 5-9 (filed August 26, 1996); SBC

Comcast and MCI claim that cross-subsidy is still a concern under price cap regulation because LECs are still allowed to elect a "sharing option."[31] However, the fact of the matter is that most of those who are currently subject to Section 22.903, including SWBT, have elected the "no sharing" option and, with a few limited exceptions, are not subject to state rate-of-return regulation.[32] For these LECs, cost allocation is a meaningless exercise that has no impact on rates. Besides, the FCC has determined as a matter of policy to use price cap regulation rather than rate-of-return regulation. In using price cap regulation, the FCC has committed to breaking the tie between prices and cost allocations. Once the FCC adopts a permanent pure price cap plan, using the total factor productivity method described as "ideally suited" in the FCC's latest price cap proceeding,[33] the FCC will have eliminated the last remaining theoretical linkage between cost allocation and prices. In view of the downward pressure on prices resulting from competition, the irrelevance of cost allocation for "no sharing" price cap carriers and the substantially reduced significance of cost allocations for other price cap carriers, the FCC should reject arguments to retain burdensome regulation based on a groundless cross-subsidy concern.[34]

Reply Comments at 24-27 (filed September 10, 1996), CC Docket No. 96-150.

[31]Comcast at para. 13; MCI at para. 9.

[32]At last count, of the 49 states in which BOCs operate, 38 of them regulate using price regulation, freezes or moratoriums. Only 5 use traditional rate-of-return regulation and 6 have sharing plans.

[33]See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Fourth Further Notice of Proposed Rulemaking, 10 FCC Rcd 13659, 13663-4 ¶¶22-25 (1995) ("We tentatively concluded in the First Report and Order that a [total factor productivity] approach should be used to compute the X-Factor in the future. Specifically, we found that, because TFP studies actually measure productivity growth rates, a TFP approach appeared ideally suited to determining the X-Factor.")

[34]PUCO claims that local service interconnection pricing rules justify retention of Section 22.903's separation requirements. It is not all clear at this point to what extent, if at all, local

Even if one ignores the fact that price cap regulation and similar forms of state regulation eliminate the need for cost allocations, the existing accounting safeguards are more than sufficient to protect ratepayers against cross-subsidy. SBC and other commenters demonstrated the efficacy of the existing accounting safeguards in their comments in CC Docket No. 96-150.[35]

The Public Utility Commission of Ohio (PUCO) questions the effectiveness of the accounting safeguards and advocates imposition of structural separation between LECs and their cellular affiliates in order to minimize the potential for misallocations of costs.[36] On the contrary, the evidence of the effectiveness of the nonstructural safeguards, as described in SBC's and other LECs' comments in CC Docket Nos. 96-149 and 96-150, is compelling and has withstood the test of time, as well as regulatory and judicial review. Consistent with its position in previous dockets,[37] the Commission confirms again in the Notice of Proposed Rulemaking in CC Docket No. 96-150 (para. 27), the nonstructural accounting safeguards ensure that nonregulated services are not subsidized at the expense of regulated service customers.

Further, in stating concerns about discriminatory access charges and the need for nondiscrimination policies,[38] PUCO fails to recognize that under the nonstructural safeguards, the nonregulated service must impute the tariffed rate for the receipt of such a service from the affiliated

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service interconnection prices would be based on the regulated costs resulting from application of Part 64 cost allocation rules. Even assuming arguendo that there is a tenuous, possible connection, it should not be the basis for adopting the most burdensome method of regulation.

[35]See SBC Comments, CC Docket No. 96-150, filed August 26, 1996, at 14-28. See also SWBT Comments, CC Docket No. 96-112, filed May 31, 1996, at 3-4 & passim.

[36]PUCO at pp. 5-10.

[37]See rulings cited in SWBT Comments, CC Docket No. 96-112, filed May 31, 1996, at pp. 3-4 & nn. 13-15.

[38]PUCO at pp. 5,8.

LEC. That is, the LEC can record no less than the tariffed rate for the provision of a tariffed service to an affiliate and must impute to the nonregulated operation no less than the tariffed rate. The existing rules assure that the nonregulated activity pays the same tariffed rate for the service as competitors. The whole hierarchy of accounting safeguards is designed to assure that no cross-subsidy occurs. These rules have been applied, tested and affirmed through numerous FCC orders and in actual use for over eight years. Nothing has occurred during the existence of these accounting safeguards that reduces their effectiveness in achieving their purpose. On the contrary, they have been strengthened and clarified over time.

PUCO and the other commenters do not present any specific data to show that the accounting safeguards do not work. Even the example of the audit of Ameritech affiliate transactions shows that the allocation process can be, and is, audited by the FCC, and where issues arise, whether as to interpretation or application, the audit process resolves those issues. Rather than being evidence of any deficiency in the existing accounting safeguards or process, as PUCO implies, such an audit resolution points to the efficacy of the nonstructural safeguards. Other commenters, such as MCI, similarly question the effectiveness of the accounting safeguards and claim that structural separation is necessary to help prevent cross-subsidy, but they fail to prove that existing accounting safeguards are not sufficient.

Cox and Comcast claim that the existing accounting safeguards do not provide enough detailed information to allow cross-subsidy to be detected.[39] On the contrary, the LECs' cost allocation manuals contain detailed information concerning nonregulated activities, which is more

[39]Cox at p. 6; Comcast at p. 12. Commenters in CC Docket No. 96-150 made similar arguments for more detailed, burdensome accounting safeguard procedures. In its Reply Comments, SBC demonstrated that these commenters had not satisfied the "heavy burden" that the FCC had imposed on those seeking imposition of more detailed accounting safeguards. SBC Reply Comments, CC Docket No. 96-150, filed September 9, 1996, at pp. 8-11, 19-20.

than sufficient to enable the FCC and independent auditors to audit compliance with the accounting safeguards. While Cox, Comcast and PUCO all seek more burdensome regulation, PUCO's arguments contradict the allegations of inadequate detail in Cox's and Comcast's comments. If the accounting safeguards did not provide enough detailed information to determine the effectiveness of the safeguards, then the audit process discussed in PUCO's comments would not work. And yet, independent auditors and the FCC have conducted numerous and extensive audits. The Cox and Comcast arguments simply fail to demonstrate that the accounting safeguards do not produce the data necessary for those safeguards to function properly, especially given that, as the FCC recognized in CC Docket No. 96-150, the burden of these regulations should be minimized. Under the standard used in CC Docket No. 96-150, which should be consistently applied here, Cox, Comcast and PUCO have not satisfied the "heavy burden" required to impose more detailed accounting safeguards than those currently in effect.[40]

The Cox and Comcast comments also reflect other misunderstandings of the existing accounting safeguards. For example, Comcast is misguided in claiming that the existing safeguards do not provide any direction to distinguish regulated telephone costs from nonregulated costs, such as costs incurred on behalf of a nonregulated cellular operation.[41] The whole purpose of the cost allocation principles adopted in CC Docket No. 86-111 was to distinguish regulated from nonregulated costs using a cost-causative method. And, contrary to Comcast's misinformation, the cost allocation process is not "entirely controlled by the subjective judgement of self-interested LEC

[40]Accounting Safeguards NPRM, 11 FCC Rcd 9054, paras. 8, 12; ("[W]e continue to seek to minimize the burden our rules impose upon those subject to them......").

[41]Comcast at p. 12.

management.'"[42] The cost allocation methods must be based on the cost allocation principles and are reviewed by independent auditors and FCC auditors. Cox's and Comcast's criticism of the Joint Cost Rules constitute belated attacks on the principles underlying the accounting safeguards the FCC has used for over eight years.

4. Section 22.903(f) Should be Deleted Because it is Superseded by the Telecommunications Act of 1996.

As SBC pointed out in its initial comments, subsection (f) of the FCC's current Rule 22.903 is both inconsistent with and superseded by the comprehensive provisions of Section 222 of the Act. Thus, subsection (f) should be eliminated from the rule. Certain commentors' arguments are collateral to the issue presented in the instant NPRM and do not withstand scrutiny in any event.

For example, Comcast argues that CPNI derived from a LEC's wireline telecommunications service offerings should not be permitted to be used to market its wireless offerings absent written customer authorizations.[43] This argument is beside the point because the only CPNI-related issue presented here has to do with the continued efficacy of Rule 22.903(f). The extent to which the term "telecommunications service" in Section 222(c)(1) may encompass wireless services, and the extent to which the term "approval" in the same section of the Act permits a notification and opt-out approval process, are both squarely presented in the CPNI Rulemaking[44] and have been the subject of many comments. Comcast's point should be rejected as it is clearly

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[42]Id. Comcast is actually commenting specifically on the network investment allocator. This allocator is not controlled by the LEC at all because any mistake in the forecast results in the LEC being penalized. Thus, the LEC has every incentive to forecast accurately. See Joint Cost Reconsideration Order, 2 FCC Rcd 6283, 6290-91 ¶¶64-70.

[43]Comcast Cellular Communications, Inc. ("Comcast"), p. 15.

[44]CPNI Rulemaking, NPRM at paras. 22-33.

beyond the scope of this proceeding and was not made in the CPNI Rulemaking.

In any case, its argument is wrong on the merits. Many companies have demonstrated that the term "telecommunications service" should be construed broadly.[45] The term should include all telecommunications service offerings provided by a carrier (including its affiliated carriers) to customers on an integrated or "packaged" basis.[46] Likewise, several companies have suggested that the Commission construct an approval process under which customers would be notified of their CPNI rights, and approval would be implied absent a customer's request to restrict such use.[47] Comcast adds no new consideration suggesting a different result on either score. To the contrary, its arguments in favor of prior written authorization are particularly illogical given that the Commission has long permitted the BOCs a CPNI notification and opt-out approval process in the CPE and enhanced services markets.[48]

AT&T and Comcast also argue that LECs which disclose CPNI to their wireless

[45]CPNI Rulemaking, SBC Reply Comments filed June 26, 1996, p. 6, n. 20.

[46]Id., pp. 6-9; see also, CPNI Rulemaking, SBC Comments filed June 11, 1996, pp. 5-10.

[47]CPNI Rulemaking, SBC Reply Comments, at 9-11. As SBC suggested, the notification should include an explanation of: CPNI, the carrier's intentions with respect to CPNI use, the customer's right to restrict such use, and the means by which the customer may restrict such use. Id. at 10, n. 11. Cellular One's customer notification (attached to Comcast's comments) fully comports with these elements. Importantly, that notification meets customer's privacy expectations regarding third parties by conveying that CPNI shared with SBC and other Cellular One affiliates "will not be disclosed to any entity that is not affiliated with" them.

[48]Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143 (1987) ("BPC CPE Relief Order"), at para. 70; Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 2 FCC Rcd 3072 (1987) ("Computer III Phase II Order"), at para. 164.

affiliates should be obligated to share that CPNI with any other wireless carrier.[49] However, Congress specifically rejected any notion that the LEC must "act as a clearing house that provides equal access to CPNI," as suggested by Comcast.[50] Instead, Congress ensured that such disclosure would not occur by requiring, in Section 222(c)(2) of the Act, that third parties obtain the customer's "affirmative written request" before being provided that customer's CPNI. As Congress has already determined that no disclosure as advanced by AT&T and Comcast can occur without a customer's writing, the Commission is not authorized to hold otherwise.

Finally, the Commission should recognize that while Rule 22.903(f) applies only to BOCs, Section 222 of the Act applies to all telecommunications carriers.[51] While the rule is imbalanced, the Act is not - Section 222 applies to all types and classes of carriers. Thus, regardless of the continued efficacy of Rule 22.903(f), it is clear that all carriers must be treated uniformly. Given this requirement, it would be far better that the Commission simply eliminate the rule rather than apply it to all telecommunications carriers.[52]

5. The Additional "Safeguards" Suggested by Certain of the Unaffected Wireless Competitors Should be Rejected.

Several of the unaffected wireless competitors suggest additional safeguards which they claim should be imposed on the BOCs and Tier 1 LECs. Such safeguards are unnecessary, unwarranted by the Act and, in some cases, anti-competitive.

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[49]AT&T, p. 23; Comcast, p. 16.

[50]Comcast, pp.16-17.

[51]CPNI Rulemaking, SBC Comments, pp. 2-5; SBC Reply Comments, pp. 1-5.

[52]Otherwise, under the rule advanced by AT&T, any CPNI held by AT&T's wireline operations that was disclosed to or otherwise shared with its wireless operations would likewise have to be available to all other wireless carriers (1994).

AT&T for example would require that they be given "advance notice" of any BOC joint marketing arrangement and the terms and conditions of such arrangement "at least three months" prior to the plan being implemented. Thus, AT&T is basically requesting that the Commission require its competitor to provide it with its marketing plans, presumably including pricing, promotions and any other terms and conditions. The Commission recognized that the filing of CMRS rates in a tariff was not in the public interest because of the effect it could have on inhibiting competition.[53] Requiring a three month wait prior to implementing joint marketing arrangements or changing the offerings would place the BOC at a severe competitive disadvantage in terms of being able to react to what is occurring in the market--requiring such arrangements and offerings to be available to the competition three months prior to implementation has a chilling effect on the ability to compete. AT&T's self-serving request for such marketing plans should be rejected.

Comcast suggests that all of the officers and directors of both the incumbent LEC and the wireless affiliate should be required to certify compliance with the various rules relating to the relationship of the parties on an annual basis (emphasis added).[54] There is no rational justification for requiring all or any officers and all directors to sign such certifications. Comcast cites to a FCC Rule requiring certification that data being submitted is correct but fails to disclose that even in that circumstance the rule requires signature by only "the officer or employee responsible for the overall preparation for the data submission" (emphasis added).[55] The penalties for non-compliance with the

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[53]<u>In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services</u>, GN Docket 93-252, <u>Second Report and Order</u>, para. 177-178 (1994).

[54]<u>See</u>, Comcast, p.10.

[55]<u>See</u>, 47 CFR 69.601(c).

various structural or non-structural safeguards are sufficient to assure compliance.[56] Annual certifications as requested by Comcast are unnecessary and unwarranted.

[56] See, SBC Comments, p. 18.

CONCLUSION

For the reasons stated herein and in SBC's initial comments in this proceeding the structural separation requirements of 22.903 should be eliminated immediately and should not be expanded to include other services or other carriers. The various arguments raised do not justify the continued application of the rules.

October 24, 1996

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FCC WT Docket No. 96-162
<u>Certificate of Service</u>

I hereby certify that a true and correct copy of the foregoing Comments will be mailed via first class mail, postage prepaid, to the following party on the 24th day of October, 1996:

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